

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION**

ROBERT DILLOW,

Plaintiff,

V.

**VIRGINIA POLYTECHNIC INSTITUTE
AND STATE UNIVERSITY, et al.,**

Defendants.

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Case No. 7:22cv280

REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS
SECOND AMENDED COMPLAINT PURSUANT TO RULE 12(b)(1)

Defendants Virginia Polytechnic Institute and State University, Shara Penermon, and Steven Schuh, (collectively “Defendants”), by counsel, submit this reply brief in support of their Motion to Dismiss pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure.

ARGUMENT & AUTHORITY

I. Virginia Tech is Not a “Person”

Without addressing either (a) this Court’s prior opinion in this matter or (b) the litany of case law cited by Defendants, Dillow claims in conclusory fashion that Virginia Tech is a “person.” Dillow relies solely on 1 U.S.C. § 1 to support his argument and makes no attempt to address the Court’s earlier decision in this case or the substantial authority supporting Defendants’ argument. Regardless of the relief sought, there is no question that Virginia Tech is not considered to be a “person” for purposes of 42 U.S.C. § 1983. Therefore, Dillow’s claim in Count One against Virginia Tech is barred. Because neither Virginia Tech nor its officials are “person[s]” for purposes of 42 U.S.C. § 1983, and Defendants are entitled to sovereign immunity afforded by the Eleventh Amendment, the Court lacks subject

matter jurisdiction to hear Dillow's claims for money damages against Virginia Tech pursuant to 42 U.S.C. § 1983 and his state law claims against Defendants.

II. Eleventh Amendment Precludes Claims for Money Damages.

Virginia Tech does not dispute that the Ex Parte Young exception to Eleventh Amendment immunity applies to a student's claim against public officials in their official capacities requesting injunctive relief. Defendants' argument as to the Eleventh Amendment pertained to Dillow's claims for money damages against Virginia Tech and its officials in their official capacities. See ECF No. 53, *3, *4.

III. State courts retain exclusive jurisdiction to hear claims under the VTCA.

To the extent Dillow properly alleged any claim pursuant to the Virginia Tort Claims Act, he concedes the Court lacks subject matter jurisdiction to hear them. Regardless, the claims are time-barred.

CONCLUSION

WHEREFORE, for the foregoing reasons, Defendants respectfully request entry of an Order granting their Motion to Dismiss Pursuant to Rule 12(b)(1), granting their Motion to Dismiss pursuant to Rule 12(b)(6), dismissing the Second Amended Complaint with prejudice and striking this case from the active docket of this Court, and granting such further relief as the Court deems just and proper.



Respectfully submitted,

VIRGINIA POLYTECHNIC INSTITUTE AND
STATE UNIVERSITY, SHARA PENERMON, AND
STEVEN SCHUH

/s/

Katherine C. Londos (VSB #: 36848)
Nathan H. Schnetzler (VSB #: 86437)
FRITH ANDERSON + PEAKE, P.C.
29 Franklin Road, SW
P.O. Box 1240
Roanoke, Virginia 24006-1240
Phone: 540/772-4600
Fax: 540/772-9167
Email: klondos@faplawfirm.com
nschnetzler@faplawfirm.com

Kay Heidbreder (VSB No.: 22288)
University Legal Counsel and
Senior Assistant Attorney General
heidbred@vt.edu
M. Hudson McClanahan (VSB No.: 46363)
hud3@vt.edu
Kristina J. Hartman (VSB No.: 92279)
kjhart06@vt.edu
Stephen F. Capaldo (VSB No.: 74045)
scapaldo@vt.edu
Associate University Legal Counsel and
Assistant Attorney General
University Legal Counsel (0121)
Burruss Hall, Suite 236, Virginia Tech
800 Drillfield Drive
Blacksburg, VA 24060
Phone: (540) 231-6293
Fax: (540) 231-6474

Counsel for Defendants



CERTIFICATE OF SERVICE

I hereby certify that on April 25, 2023, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will automatically send notification of such filing to all counsel of record.

/s/ Nathan H. Schnetzler
Of Counsel

